STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CITIZENS UTILITY BOARD	)	
	)	
Complaint requesting the ICC to order	)	Docket No. 03-0592
Peoples Energy Services to cease	)	
and desist misleading marketing	)	
of Gas offering.	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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NOW COMES the Staff of the Illinois Commerce Commission ("Staff" and "Commission") by and through its attorneys, and files its reply brief in this proceeding.

I. INTRODUCTION

In addition to Staff, initial briefs ("IB") were filed in this matter by the Citizens Utility Board ("CUB") and Peoples Energy Service Corporation ("PESCO" or "Company"), an alternative gas supplier ("AGS"). Staff's takes issue with the PESCO IB below.

II. ARGUMENT

A. PESCO's criticism of the Commission for not defining the phrase "adequately discloses" under Section 19-115(f) of the Public Utilities Act (PUA) is inappropriate.

PUA Section 19-115(f), applicable to AGSs, requires that "Any marketing materials which make statements concerning prices, terms, and conditions of service shall contain information that *adequately discloses* the prices, terms and conditions of the products or services." Emphasis added. PESCO suggests that the Commission is somehow at fault for not defining the phrase "adequately discloses[,]" or for declining previous opportunities to clarify the factors constituting adequate price disclosure under similar PUA sections. PESCO IB, pp. 3, 19, and 21.

PESCO unnecessarily creates a cloud of doubt around this express, straightforward statutory requirement in order to distract the Commission's attention from the Company's violation of the requirement. Having clearly run afoul of Section 19-115(f)'s adequate-disclosure provision, PESCO now asks the Commission to reimagine the statute and erase the violation. Staff disagrees with PESCO's creative interpretation and asks that the Commission refuse this unnecessary interpretive exercise in favor of the simple facts – and statutory language – at hand.

Staff witness Joan S. Howard reviews PESCO's natural gas offer and states that "The price of the offer […] cannot exactly be determined based on the limited information provided" and, with respect to certain offer components, "no price is disclosed and it remains unclear what the customer would pay[.]" Affidavit of Joan S. Howard, p. 5.

When a customer cannot exactly determine price, and it is unclear what the customer will pay, the offer in no way adequately disclose all prices, terms, and conditions.

B. PESCO's marketing letter and natural gas agreement do not adequately disclose the prices, terms and conditions of the Company's product and service.

PESCO states that its "Offer Letter and Agreement provide a clear description of the Offer price and terms in plain language". PESCO IB, p. 8. The Company's marketing letter states in bold type that it is offering customers a fixed price of "62 cents per therm for all the gas you use until September 2005[,]" mentioning no other price. Affidavit of Joan S. Howard, p. 4; Staff IB, pp. 4-5. As a practical matter, PESCO's 62-cent price is the commodity price only and does not include various other charges and pass throughs to the customer. PESCO defends the marketing letter's misstatement by referencing the accompanying natural gas agreement, arguing that "nothing in the

Agreement, including utility pass-through charges, changes the [62 cent] commodity price." PESCO IB, p. 9.

Yet the words "commodity price" never appear in PESCO's marketing letter or natural gas agreement – and certainly not in the marketing letter's prominent "62 cents per therm for all the gas you use" sales pitch. Nothing in the marketing letter suggests that 62 cents is a commodity price only, separate and apart from undisclosed charges and pass throughs the customers incur.

In reality the offer price is considerably more than 62 cents, certainly not fixed, and never fully disclosed. The slightly more complete natural gas agreement states that the offer price consists of 62 cents per therm (Staff finds no reference to "commodity price[,]" as discussed above), charges assessed or collected by the utility as cost pass throughs – which charges PESCO does not specifically identify, making them impossible for customers to predict, much less calculate – and a $2.95 monthly administrative charge. Affidavit of Joan S. Howard, p. 5.

For instance, customers in Northern Illinois Gas Company's service territory pay PESCO additional per therm aggregation balancing service charges, storage service costs, and transition surcharges; several of these charges vary monthly. Transcript, pp. 63-66. In October 2003 the total of these three additional costs ranged between 2.2 and 5.7 cents per therm. Transcript, pp. 59-60. (Will they be the same in future months? Customers – and Staff – have no way of predicting given PESCO's limited disclosures.) Customers in North Shore Gas Company's service territory also pay PESCO additional per therm aggregation balancing service charges. Transcript, p. 60.

PESCO's promise of a fixed rate – particularly a fixed rate of 62 cents per therm – is entirely illusory.

C. The Commission should reject PESCO's argument that the "Offer" is the marketing letter and natural gas agreement read collectively.

PESCO defends the shortcomings of its marketing letter – which fails to completely disclose the price, terms, and conditions of its offer – by linking it to the Company's separate natural gas agreement, arguing that the "Offer" is the marketing letter and natural gas agreement taken as a whole. In other words, under PESCO's logic the Company may misrepresent prices, terms, and conditions in the marketing letter so long as it corrects these errors in the fine print of the accompanying natural gas agreement.

PESCO attempts the *post facto* positioning of these two separate documents as a single, collective "Offer" for purposes of PUA Section 19-115(f), seeking excusal of the marketing letter's stand-alone violation of the "prices, terms and conditions" disclosure requirements given the natural gas agreement's slightly stronger – if still noticeably deficient – disclosure provisions. PESCO states that the "Offer Letter provides a brief description of the Offer" and the "Agreement describes in detail the services that PE services provides[….]" PESCO IB, pp. 6-6.

The Commission should reject PESCO's argument. PESCO's inclusion of a separate natural gas agreement in the same mailing as its stand-alone marketing letter in no way relieves the Company of its responsibility to fully disclose all prices, terms, and conditions in the marketing letter itself. Affidavit of Joan S. Howard, p. 7. "It is the promises made in the marketing material that attract customers – not the fine print of the contract or agreement – that remain with the customer [….]" Affidavit of Joan S. Howard, p. 2. Only after CUB files its complaint does PESCO conveniently argue that the separate natural gas agreement is somehow integral to the misleading sales puffery of the Company's 62 cent, fixed price marketing letter misrepresentations. The Commission should not be persuaded by the PESCO's attempt to sidestep the marketing letter's glaring disclosure inadequacies.

D. The Commission has a sufficient record to determine that the PESCO's marketing letter and natural gas agreement violate PUA Section 19-115(f).

PESCO argues that "CUB has not met its burden of proof" since "CUB has provided no direct evidence of confusion or that the disclosures were not adequate. […] Mere speculation about whether marketing material could be confusing or how a customer would react to the Offer cannot be determinative of the issues in this case." PESCO IB, p. 5.

The present record is in no way deficient, as the marketing letter and natural gas agreement alone provide the Commission a sufficient evidentiary basis for determining PESCO's violation of PUA Section 19-115(f). PESCO's failure to meet price, term, and condition disclosure requirements is apparent from the Company's materials, as well as CUB and Joan S. Howard of Staff's statements that the price offered in the marketing letter differs from the price actually charged and that there remains no way to accurately predict PESCO's future pricing. Although customer testimony regarding "confusion" might offer persuasive confirmation of PESCO's poor practices, it is not essential to establishing the Company's disclosure violation. PESCO's marketing letter and natural gas agreement, coupled with CUB and Staff statements presently available, provide a strong factual basis for any Commission determination against the Company.

E. PESCO's suggested supplemental letter remains deficient; the Commission should require the Company to work with the Commission's Consumer Services Division to resolve the deficiencies

PESCO offers a "Supplemental Letter for distribution to customers in an effort to clarify any alleged ambiguity in the Offer" (PESCO IB, p. 21), arguing that this suggested supplemental letter now adequately discloses the prices, terms, and conditions of the Company's natural gas offer. Staff disagrees; even with the suggested supplemental letter's additional disclosures, Staff remains unable to predict or calculate future customer charges with any degree of certainty. The suggested supplemental letter "still fall[s] short of the Commission's Consumer Services Division's reasonable expectations, largely since customers still remain unclear about the actual price they will pay." Second Affidavit of Joan S. Howard, p. 2; Staff IB, pp. 8-9. Accordingly, the Commission should order PESCO to work with Staff, as PESCO suggests it is willing to do (PESCO IB, p. 23), to ensure that all price, term, and condition disclosures are properly made in all PESCO marketing materials – the suggested supplemental letter included.

While the Consumer Services Division respects the Commission's need and desire for expediency in these matters, it nonetheless cautions that tight turnaround deadlines often provide utilities and AGSs unintended leverage against the Division; sometimes they couple approaching Commission deadlines with an unwillingness to accede to reasonable Staff requests. (Staff in no way suggests that PESCO is presently engaging in this practice.) In order to preserve a strong Staff position in the resolution of this and future Consumer Services Division matters, Staff asks that the Commission not place the Division in the weak position imposed deadlines often create.

III. CONCLUSION

WHEREFORE, for the foregoing reasons and those stated in the Staff IB, Staff respectfully requests that all of its recommendations be adopted by the Commission in their entirety.

Respectfully submitted,

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